LIBRARY
PREME COURT, U. S.

FILED
NOV 8 1968
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 653.

EMMOGENE SNYDER PRESCOTT,
Petitioner,

vs.

SHELL OIL COMPANY, INC.,
Respondent.

BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

J. MARTIN REGAN,
2201 First National Bank Building,
Memphis, Tennessee 38103,
Attorney for Respondent, Shell Oil Company, Inc.

LAUGHLIN, WATSON, GARTHRIGHT & HALLE,
Of Counsel.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

TABLE OF CONTENTS OF BRIEF.

	Page
Jurisdiction	2
Counter statement of facts	4
Argument	5
Question No. I	5
Question No. II	10
Conclusion	27

Cases Cited.

Adams v. Helburn, 198 Ky. 546, 249 S. W. 543 (1923) 25
Adams v. Willis, 225 S. C. 518, 83 S. E. 2d 171 (1954) 19, 22

Bartlett v. Philip-Carey Manufacturing Co., 216 Tenn. 323, 392 S. W. 2d 325 (1965) 7
Blair v. Snodgrass, 33 Tenn. 1, ... S. W. ... (1853) ... 10
Brister v. Brubaker's Estate, 47 Tenn. App. 150, 336 S. W. 2d 326 (1960) 14, 15, 16
Butler v. Richardson, 74 R. I. 344, 60 A. 2d 718 (1948) 19, 23

DeFord v. National Life & Accdt. Ins. Co., 182 Tenn. 255, 185 S. W. 2d 617 (1945) 6

Gulf Refining Co. v. Belz, 204 Tenn. 47, 315 S. W. 2d 403 (1958) 12

Harding v. Gibbs, 125 Ill. 85, 17 N. E. 60 (1888) 25

Imperial Refineries Corporation v. Morrissey, 254 Iowa 934, 119 N. W. 2d 872 (1963) 25

Manasse v. Ford, 58 Cal. App. 312, 208 P. 354 (1922) 25

Pence v. Archer, 191 Tenn. 385, 234 S. W. 2d 820 (1950) 11

Shell Oil Co., Inc. v. Blumberg, 154 F. 2d 251 (5th Cir. 1946) 2, 18, 34
Shell Oil Co. v. Prescott, 398 F. 2d 592 (6th Cir. 1968) 2
Sinclair Refining Co. v. Clay et al., 102 F. Supp. 732, aff'd, 6th Cir., 194 F. 2d 532 (1952) 16, 17, 18, 24
Stone v. Martin, 185 Tenn. 369, 206 S. W. 2d 388 (1947) 7
Texaco, Inc. v. Rogow, 150 Conn. 401, 190 A. 2d 48 (1963) 25

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. .....

EMMOGENE SNYDER PRESCOTT,
Petitioner,

vs.

SHELL OIL COMPANY, INC.,
Respondent.

BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The opinion of the Sixth Circuit Court of Appeals affirming the decision of the United States District Court for the Western District of Tennessee, Western Division in favor of Shell Oil Company, plaintiff in the trial court, appellee in the Court of Appeals, and respondent herein, is reported in 398 F. 2d 592 (July 23, 1968).

JURISDICTION.

Petitioner in this case has prayed that a writ of certiorari issue to review the judgment of the United States District Court for the Western District of Tennessee, Western Division, and has prayed that this Court review and reverse the judgment of that Court and also the judgment of the United States Court of Appeals for the Sixth Circuit. Without waiving any question of jurisdiction with regard to a prayer for issuance of a writ of certiorari to review the decision of a trial court, respondent will reply to the petition viewed as a petition for issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Rule 19 (b), Rules of the Supreme Court of the United States, makes provision for consideration of granting a review on writ of certiorari "Where a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter; . . ." This is the rule relied upon by petitioner, and it is claimed that this rule is applicable because the case of **Shell Oil Co., Inc. v. Blumberg**, 154 F. 2d 251 (5th Cir. 1946), decided the issues in favor of the landowner, whereas the Sixth Circuit in the instant case decided the issues in favor of the tenant oil company.

The **Blumberg** case and the instant case were diversity cases decided by federal courts sitting in different states under different fact situations. More importantly, the contractual provisions in the leases involved in the **Blumberg** case and in the instant case were different in material respects. The different facts taken in conjunction with the different lease provisions formed the basis for different results which were reached by the Fifth Circuit Court of Appeals in the **Blumberg** case and the Sixth Circuit Court of Appeals in the **Prescott** case, which is the instant case.

Respondent respectfully contends that contrary results in separate cases decided under different facts with different lease provisions do not amount to a conflict between decisions of court of appeals on the same matter within the contemplation of Rule 19 (b). The dissimilarity between the **Blumberg** case and the instant case will be noted in the brief which follows. However, it is appropriate to note herewith the observation of the Sixth Circuit on the point, which is contained in the following excerpt from that Court's decision in this case:

> "Appellant relies on the following cases involving dual option leases, all of which she contends support her position that lessee's rights under the purchase opiton terminate once an election is made not to purchase the leased premises when given the opportunity to do so on a first refusal basis. Harding v. Gibbs, 125 Ill. 85, 17 N. E. 60 (1888); Manasse v. Ford, 58 Cal. App. 312, 208 P. 354 (1922); Adams v. Helburn, 198 Ky. 546, 249 S. W. 543 (1923); Shell Oil Co., Inc. v. Blumberg, 154 F. 2d 251 (5th Cir. 1946); Northwest Racing Ass'n v. Hunt, 20 Ill. App. 2d 393, 156 N. E. 2d 285 (1959); Texaco, Inc. v. Rogow, 150 Conn. 401, 190 A. 2d 48 (1963). However, while so-called dual option lease agreements are often generally similar, because of variances in phrasing and circumstances of execution it is not often that a decision construing one contract will be dispositive of a case construing another. The prime and controlling distinction between the above cases and the instant case is found in the language of Article Fourteen preserving to Shell its rights to the purchase option. In all of the above cases, there was either a basis for finding that the purchase option had been limited or qualified by the first refusal option, or nothing to indicate that the purchase option was not limited or qualified by the first refusal provision. That is not the case

here. Shell's right under the fixed price option in Article Thirteen was not limited or modified in any manner by the subsequent Article giving to it the right of first refusal. On the contrary, by the specific terms of Article Fourteen, Shell's rights thereunder were 'in addition and without prejudice to Shell's rights under Article Thirteen. * * *' Further, the failure to exercise the Article Fourteen option was, according to its explicit language, 'in no way [to] affect * * * Shell's rights under Article Thirteen.' Accordingly, it is here determined that judgment was properly entered for Shell, and the judgment should be affirmed.

Affirmed."

COUNTER-STATEMENT OF FACTS.

Respondent accepts the statement of facts in petitioner's brief, with the additional statement that, subsequent to the filing by Shell Oil Company of its motion for judgment on the pleadings, the parties filed a stipulation of facts; and thereafter on February 3, 1967, Shell Oil Company filed its motion for summary judgment. Thus the cause was heard by the Court on motions of both parties for summary judgment.

ARGUMENT.

I.

Should the Court Construe a Lease as Written, and Refuse to Make a New Contract for the Parties?

The District Court and the Court of Appeals Answered This Question "Yes."

The Answer Should Have Been "Yes."

1. The Court can only construe a lease as written and cannot make a new contract for the parties.

It is axiomatic that a party is bound by what he signs, and that courts will not remake contracts for parties. In this case the petitioner did not contend that she did not read the contract or understand its terms, nor that it is not an entirely valid contract. However, the effect of her refusal to convey the property pursuant to paragraph 13 amounts to a renunciation of that portion of the contract, presumably influenced by an increase in the value of property generally and this property in particular.

Articles Thirteenth and Fourteenth of the subject lease are set forth herewith for ready reference:

> Thirteenth. At any time during the term of this lease, or any extension or renewal, Shell shall have the option to purchase the leased premises, with all appurtenances, improvements and equipment, and Lessor's fixtures and personal property thereon, for the sum of Thirty-Two Thousand Five Hundred Dollars ($32,500.00), exercisable by notice to Lessor.
>
> Fourteenth. If at any time during the term of this lease, or any extension or renewal thereof, Lessor receives from a ready, willing and able purchaser a bona fide offer to purchase the leased premises, which

Lessor desires to accept, Lessor shall give Shell notice, setting forth the name and address of the prospective purchaser and the price and terms of the proposed sale, accompanied by Lessor's affidavit that such prospective sale is in good faith. Shell shall thereupon, in addition and without prejudice to Shell's rights under Article Thirteen, have the prior option to purchase said premises and Lessor's improvements, fixtures and personal property thereon from Lessor at said price and terms. If Shell elects to exercise said option, it shall so notify Lessor within twenty-five (25) days after Shell's receipt of the aforesaid notice of Lessor's desire to sell. Shell's right to purchase under this Article shall be a continuing right during this lease, or any extension or renewal, whenever Lessor, or any successor in title, desires to sell said property. Shell's failure to exercise any option under this Article shall in no way affect this lease, Shell's rights under Article Thirteenth, or its right to the estate herein created.

It is to be noted that Article Fourteenth provides that Shell's rights under that article are "in addition and without prejudice to Shell's rights under Article Thirteenth," and further that Shell's failure to exercise any option under Article Fourteenth shall in no way affect Shell's rights under Article Thirteenth. Petitioner's contention is that by giving Shell notice under Article Fourteenth of the existence of a bona fide offer from the third party, she thus precluded Shell from exercising its right under Article Thirteenth to purchase the property for the price fixed therein. In order to support this contention, the provisions of Article Fourteenth just referred to would necessarily have to be ignored or deleted from said Article Fourteenth.

With respect to the binding effect of written contracts, the Tennessee Supreme Court in **DeFord v. National Life**

& Accdt. Ins. Co., 182 Tenn. 255, 185 S. W. 2d 617 (1945), stated:

> "The general principle involved was thus stated by a high authority many years ago:
>
> " 'It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission.' **Upton v. Tribilcock**, 91 U. S. 45, 50, 23 L. Ed. 203."

Again, it was stated in **Stone v. Martin**, 185 Tenn. 369, 206 S. W. 2d 388 (1947):

> "However, we are fully sensible of our limited function and that we can only construe the lease as written, and not make a new contract for the parties. Gibson's Suits in Chy., sec. 949; **Southern Style Shops v. Mann**, 157 Tenn. 1, 4 S. W. 2d 959."

2. All clauses of a contract should be construed as in harmony with each other if possible. However, if two clauses of a contract are so repugnant to each other that they cannot stand together, the first will be received, and the latter rejected.

The principle announced has been stated by the Tennessee Supreme Court in **Bartlett v. Philip-Carey Manufacturing Co.**, 216 Tenn. 323, 392 S. W. 2d 325 (1965), as follows:

> "Counsel for appellee correctly state the legal principle that 'if two clauses of a contract are so repugnant to each other that they cannot stand together,

the first shall be received and the latter rejected.' However, the *sine qua non* of this rule is a repugnancy; we have already noted that there is an absence of repugnancy in the contract before the Court.

"This principle was recognized in the case of **Bank of Commerce & Trust Co. v. Northwestern Life Ins. Co.**, 160 Tenn. 551, 26 S. W. 2d 135, 68 A. L. R. (1930), but the Court there stated that it must construe the contract so that all clauses will be in harmony, if such a construction is possible. It would seem that the construction placed upon the contract by the Chancellor violated this duty, since there is no logical inconsistency in the two paragraphs.

"Bartlett, through counsel, relies on the following language from **Weatherly v. American Agricultural Chemical Co.**, 16 Tenn. App. 613, 65 S. W. 2d 592 (1933):

" 'Where contract involved in suit was drafted by defendant's attorney, language thereof, if ambiguous, must be construed most strongly against the defendant.'

"Again we agree with the principle expressed, but as there is no ambiguity in the contract here before us there is no basis for applying it. Merely because language happens to be technical or complex to the layman does not render it ambiguous.

" 'If there is no ambiguity in the contract, its interpretation becomes a question of law.' **Foote Mineral Co. v. Maryland Cas. Co.**, 173 F. Supp. 925, 931 (E. D. Tenn. 1959). Also see **Aetna Life Ins. Co. of Hartford, Conn. v. Bidwell**, 192 Tenn. 627, 630, 241 S. W. 2d 595 (1951) to the same effect."

In the instant suit, respondent maintains that paragraphs 13 and 14 are not repugnant, in that paragraph

13 gives the lessee a clear option to buy at a fixed price while paragraph 14 in effect gives the lessee a "first refusal" in a case wherein the lessor is proposing to make a sale for a lower price.

Thus, the two paragraphs can stand together and are not repugnant. However, respondent cites the above authority for the proposition that, if said causes should be considered to be repugnant, paragraph 13 would prevail, and this is the paragraph under which respondent exercised its option to purchase the property for $32,500.

In contracting to pay the stipulated rental, respondent purchased three rights:

(1) Tenancy for the term of the lease.

(2) The right to purchase for $32,500 in any event, if exercised during the term.

(3) The right to purchase the property at a lesser price—a first refusal—in the event that the owner receives such an offer from another party, and wishes to make the sale.

Obviously, the tenant would not exercise this last right if the proposed sale price exceeded the option price of $32,500. But paragraph 14 does provide the tenant an opportunity whereby the property can be purchased for less than the option price if the owner proposes to sell it to another for such lesser price. This right is without prejudice to Shell's right under paragraph 13, as is seen from the following sentences excerpted from paragraph 14:

> "Shell shall thereupon, in addition and without prejudice to Shell's rights under Article Thirteenth, have the prior option to purchase said premises and Lessor's improvements, fixtures and personal property thereon from Lessor at said price and terms.
>
> * * * * * * *

"Shell's failure to exercise any option under this Article shall in no way affect this lease, Shell's rights under Article Thirteenth, or its right to the estate herein created."

II.

Should the Court Grant Specific Performance of a Written Option to Purchase Real Estate, Which Is Certain, Fair to All Parties, and Capable of Being Performed?

The District Court and the Court of Appeals Answered This Question "Yes."

The Answer Should Have Been "Yes."

1. Traditionally, courts of equity will decree specific performance of a contract for the sale of realty, as against the objection that the complainant should be remitted to an action at law for damages.

This principle was stated by the Tennessee Supreme Court as early as 1853 in the case of **Blair v. Snodgrass**, 33 Tenn. 1, ... S. W. ... (1853), as follows:

"It is true that, in the absence of any valid objection, it is a matter of course to decree the specific performance of a contract for the sale of real property. It is a higher and more perfect remedy than the damages which a court of law can give for a breach of the contract. 9 Ves. 608; 12 id. 395; 4 Pet. 311, 328.

"As a general rule, 'courts of equity will decree a specific performance where the contract is in writing, and is certain, and is fair in all its parts, and is for an adequate consideration, and is capable of being performed, but not otherwise.' 2 Story's Eq. Jur. 751; **Denton v. Stewart**, 1 Coxe 258; **Cathcart v. Robeson**, 5 Pet. 264."

In the instant case, respondent maintains that this written contract, when reasonably construed, is certain, fair

in all its parts, is for an adequate consideration, and of course is capable of being performed.

The case of **Pence v. Archer**, 191 Tenn. 385, 234 S. W. 2d 820 (1950), was one in which the Court decreed specific performance of a contract to sell realty despite the contention of the owner that the written memorandum relied upon was too indefinite. The parties made an oral agreement for the sale of the subject property, which was followed by a written memorandum signed by the owner, stating in its entirety:

> " 'This is to certify that we, L. G. Archer and wife Estella Archer, hereby agree to give Mr. E. E. Pence to February 1, 1950 on a certain trade agreement or option on a house and lot at 403 West Walnut Street, Johnson City, Tennessee. Agreed price to be ten ($10,000) Dollars at least $8,000 cash on day of sale.
>
> " 'This Dec. 24, 1949.
>
> " 'Signed L. G. Archer,
> Estella Archer.' "

The legal description of the property in fact was: "Lots 1, 2, 3 and 4 and ten feet off the easterly side of Lot 5 of block 16 of the southwest addition of Johnson City, Tennessee . . ."

The purchaser accepted the offer, but the owner declined to convey, and defended the ensuing action for specific performance on the ground that the written memorandum was too vague and indefinite to support the action. The Court, however, held that parol evidence would be admissible to establish the location and boundaries of the tract, and decreed specific performance. The Supreme Court affirmed this action of the Chancellor. In the instant case, of course, there is no such indefiniteness, and there is no need to rely upon parol evidence.

The case of **Gulf Refining Co. v. Belz**, 204 Tenn. 47, 315 S. W. 2d 403 (1958), involved the construction and enforcement of an option provision in a lease executed by Philip Belz and wife in favor of Gulf Refining Company for the operation of a gasoline filling station. The Chancellor decreed specific performance, and the Tennessee Supreme Court affirmed. The Court, in setting forth its views as to the meaning of the option provisions, states:

> "There is, however, one rule which the Court should apply in ascertaining that construction. That rule is that an option to purchase land within a given time should be construed so as to 'extend the time the full limit of which the contract is susceptible, so as to prevent the right granted from being lost'. **Allen v. Effler**, 144 Tenn. 685, 696, 235 S. W. 67, 70. In this connection, it must also be kept in mind that one of the considerations which moved Mr. and Mrs. Belz to give this option was the leasing from them of this property for a term of years by Gulf Refining Company."

The owners contended that certain provisions of the lease indicated that the sale was to be completed "on or before the end of the lease". Thus they argued that the notice should be given a sufficient time prior to the end of the lease for them to prepare an abstract of title, with an additional sixty days provided for the optionee to examine the title, all amounting to approximately ninety days. The notice in that case was given eight days before the expiration of the lease, and it was contended that this was insufficient. The Court disposed of this contention, stating:

> "As this Court views the matter, the option contract is certainly susceptible of being construed to mean that the Gulf Refining Company had up to the expiration of the lease within which to give notice of

its election to purchase. Being susceptible of that construction, it must be given that effect unless we ignore the rule stated in **Allen v. Effler,** *supra*, that an option contract will be so construed as to 'extend the time the full limit of which the contract is susceptible, so as to prevent the right granted from being lost.' "

Finally, it was argued that there was lack of mutuality and that thus the option provision must fail. The Court rejected this contention, stating as follows:

"Appellants insist that even though the option be given the construction placed upon it by the Chancellor, nevertheless, the bilateral agreement resulting from the notice of the exercise of the option is void because it lacks mutuality of remedy. Their position is that the Gulf Refining Company could not be compelled to take the property because it reserved the right to exercise its own individual judgment or whim as to what was desired in the way of building or construction permits', and as to whether the title was 'satisfactory' to it.

"Except in cases involving feelings, taste or sensibilities these to 'the satisfaction' of the purchaser cases have been construed to mean that what would be 'satisfactory to a reasonable man would be sufficient'. **Tennessee & Southeastern Coal Co. v. Schwitzer-Cummins Co.,** 173 Tenn. 524, 533, 131 S. W. 2d 553, 556. See also **Robeson & Weaver v. Ramsey,** 147 Tenn. 25, 32, 246 S. W. 413, and **Ragsdale v. Dyer,** 150 Tenn. 496, 513, 266 S. W. 91.

"By way of illustration, the Gulf Refining Company could not require an unlawful building or construction permit and then avoid this agreement on the ground that it could not procure the desired permit. Its demand must be reasonable.

"The same reason applies as to the ability to avoid the agreement on the ground that the title 'is unsatisfactory' to the Gulf Refining Company. Its dissatisfaction must be on natural grounds. . . ."

Brister v. Brubaker's Estate, 47 Tenn. App. 150, 336 S. W. 2d 326 (1960), was an action by a purchaser against the administrators and heirs of a deceased landowner for specific performance of a contract for sale of a lot. The Chancellor dismissed the action. The Court of Appeals reversed, holding the Chancellor abused his discretion, and the Supreme Court denied certiorari. The evidence of the contract was a check for $200 drawn by complainant on the Union Planters National Bank, payable to and endorsed by C. B. Brubaker, who died before the action was brought. On the face of the check appeared this notation:

" 'Deposit on Lot 58 by 135 located east side of Highway 61 S. 216 feet north of Eastman Road, Shelby County, Tenn. Bal. $65.00 per front ft. due $35.00 per month after $500.00 is paid at closing. Title guaranteed.' "

The Court of Appeals held this writing to be sufficiently clear, and then added:

"Another contention, which is urged in behalf of the defendants in the instant case, is that specific performance is not a matter of absolute right, but is a matter addressed to the sound legal discretion of the court; for which proposition counsel for defendants cite **Morrison v. Searight,** 62 Tenn. 476, 481; **Northcutt v. Massie,** 201 Tenn. 638, 301 S. W. 2d 355, 357; **Parsons v. Hall,** 185 Tenn. 363, 199 S. W. 2d 99; **Johnson v. Browder,** 185 Tenn. 601, 207 S. W. 2d 1, and Gibson's Suits in Chancery (5th Ed.), Section 995. It is contended, of course, that the Chancellor did not abuse his discretion in the instant case.

"On the other hand, counsel for complainant contends that, ordinarily, Equity will decree specific performance of a contract for sale of land, as a matter of course, in the absence of any valid objection, where the contract is valid; and for this proposition they cite: Pomeroy's Equity Jurisprudence, 5th Ed., Vol. 4, p. 1034; **Blair v. Snodgrass,** 33 Tenn. 1; **Radiophone Broadcasting Station v. Imboden,** 185 Tenn. 215, 191 S. W. 2d 535, and **Richardson v. Bristol Land and Improvement Co.,** 1 Tenn. App. 671.

"As applied to the facts of the instant case, we adopt the view of the complainant, rather than that of the defendants; and we hold that the learned Chancellor abused his discretion by refusing a decree of specific performance."

2. **Increase in value of land is not a sufficient ground for denying specific performance of contract for its sale.**

The case of **Brister v. Brubaker's Estate,** 47 Tenn. App. 150, 336 S. W. 2d 326 (1960), is discussed above. In addition to the rulings set forth above, the Court also stated certain facts relating to increase in value, and its conclusion in connection therewith as follows:

"As to terms of payment, the contract is equally clear. It provides that $65 per front foot shall be paid at the rate of $35 per month after $500 is paid at closing. Sixty-five dollars per front foot for the 58 feet fronting on Highway 61 S. totals $3,770, which added to the $200 represented by the check itself, and $500 additional to be paid at closing, makes the total price of the lot $4,470. This figures to be a little more than $77 per front foot, which is certainly not a grossly inadequate consideration. The Chancellor's opinion says, 'That the fair market value of the land in question was $75.00 per front foot in 1955, and it is worth $175.00 per front foot at the present time.'

"Change in value is not sufficient ground for denying specific performance. **University of Tennessee v. Memphis Hospital College Building Company,** 6 Tenn. App. 131; **Smith's Heirs v. Christmas,** 15 Tenn. 565; **Rogers v. Roop,** 19 Tenn. App. 579, 92 S. W. 2d 423; 49 Am. Jur., Specific Performance, Sec. 64, p. 78."

The cases cited in the excerpt just above have been examined, and are authority for the proposition stated herewith. However, they will not be further discussed here for the reason that the principle involved is so clearly stated in the case of **Brister v. Brubaker's Estate,** supra.

3. **Cases construing dual option provisions analyzed.**

The case of **Sinclair Refining Co. v. Clay, et al.,** 102 F. Supp. 732, **aff'd,** 6th Cir., 194 F. 2d 532 (1952), is very apposite to the present case, and the decision approved therein by the Sixth Circuit can well be applied to the facts of this case. In the **Clay** case, one Robertson leased certain property to Sinclair Refining Company. The lease **prepared by Sinclair,** contained a purchase option in Article XIV and a first refusal option in Article XV. The latter Article specified that the lessor should give the lessee notice of an offer to purchase made by another party, and that the lessee had a first refusal to purchase at the price offered, to be exercised within ten days. It was then provided:

"In the event Lessee shall not give Lessor notice, within said ten-day period, of its election to purchase for the amount specified in said offer, Lessee shall not be obligated to purchase, and Lessor may thereafter sell said premises to the party making the offer; subject, however, to this lease and to the leasehold estate herein granted, and to the extension and/or additional purchase options, if any, herein granted to Lessee. If for any reason said premises are not sold

to such party, notice of any subsequent bona fide offers acceptable to Lessor, shall be given to Lessee upon the same terms and conditions for acceptance or rejection as hereinabove provided."

It is to be noted that the quoted language preserving the lessee's rights in its purchase option by making a sale to another party—after lessee's failure to exercise its first refusal—subject to lessee's leasehold estate and "additional purchase options, if any," is by no means as clear and strong as is the language in the case under consideration.

In the **Clay** case, the lessor, Robertson, sold the property to Mrs. Clay, presumably after giving notice to Sinclair. Five years later, Sinclair notified Mrs. Clay that it exercised its option to purchase for $8,500. A few days thereafter, Mrs. Clay secured an offer for $18,500, and offered Sinclair first refusal at that price. Mrs. Clay defended a specific performance action on the grounds that Sinclair lost its purchase option when it refused to purchase from Robertson. The Court awarded specific performance, holding Mrs. Clay, purchaser from the lessor, bound by the terms of the lease, stating:

"Purchase option agreements in leases are not separate and distinct offers which can be withdrawn before acceptance. The giving and acceptance of an option to buy is enforceable and the landlord does not have the right to refuse to carry out his agreement after the lessee exercises his option in accordance with the terms of the lease. Furthermore, such option is a covenant which runs with the land and a grantee of the lessor is bound by the terms of the covenant. Thompson on Real Property, Secs. 1325-1330. This seems to be the general law on this subject, and indeed the parties to the lease intended that any grantee should take the property subject to Sinclair's purchase

option (Article 15). Mrs. Clay admittedly knew of the terms of the lease and she accepted such terms in writing (Plaintiff's Exhibit 5). No other conclusion can be reached than that the purchase option was a continuing obligation which Mrs. Clay must honor."

* * * * * * * *

"Here, of course, we are dealing with Sinclair's purchase option, and not its first refusal option. These two options are separate and distinct. It well may be that failure to exercise a first refusal option after proper notice extinguishes such option, and the language of Article XV could be so construed; but loss of this option still leaves the purchase option upon which Sinclair bases its action."

(102 F. Supp. at p. 734.)

If a purchaser from the lessor is held bound to recognize a purchase option—notwithstanding intervening failure to exercise a first refusal option—it would appear, a fortiori, that the lessor is bound.

Petitioner relies upon the case of **Shell Oil Co., Inc. v. Blumberg,** 154 F. 2d 251 (5th Cir. 1946), in support of her position that once she gave Shell notice of a bona fide offer, it could no longer rely upon its option to buy for the price stipulated in the lease. Rather than undertake to distinguish the **Blumberg** case independently, it appears proper to quote from the **Clay** case discussed above:

"In the **Blumberg** case (154 F. 2d 252) it was held that a failure to exercise a first refusal option extinguished both the first refusal option, and the purchase option. But in that case, and correctly so, the court held that the first refusal option modified the purchase option, and the language in the lease to which the court must have been referring is as follows: 'In the event of a sale to any third party by the Lessor, and in the event such purchaser should there-

after desire to sell said property Lessee shall have the like option to purchase at the price offered by any bona fide prospective purchaser * * *; it being understood that this right of the Lessee to purchase at the offered price shall be a continuing right during the existence of this lease whenever * * * any subsequent owner * * * may desire to sell'.

"This section by expressly providing that the first refusal option was a continuing obligation impliedly indicates that the original parties intended that the purchase option would continue only so long as the original lessor held the fee. It seems to me that the court there was relying on this language in holding that the purchase option was extinguished, and was not announcing a general principle of law to govern purchase options regardless of the language used in that lease by the parties. In the lease here in question the parties agreed as follows: '* * * and Lessor may thereafter sell said premises to the party making the offer; subject, however, to this lease and to the leasehold estate herein granted, and to the extension and/or additional purchase options, if any, herein granted to Lessee.'

"Contrary to the **Blumberg** case, the parties here expressly agreed that the purchase option was to continue in the event of a sale to a third party, and this intent must be carried out by the court, even if it does mean that the first refusal option becomes only a device by which lessor could induce an acceleration of Sinclair's decision to purchase by affording it an opportunity to purchase at a price more advantageous to it than the price fixed in the option. **Butler v. Richardson,** 74 R. I. 344, 60 A. 2d 718.

(102 F. Supp. at pp. 734, 735.)

The **Clay** case, discussed above, was followed by the Supreme Court of South Carolina in **Adams v. Willis,** 225

S. C. 518, 83 S. E. 2d 171 (1954), an action for specific performance. In this case, Sinclair Oil Company took a lease on certain property, which it thereafter assigned to Adams. The original owner-lessor sold the property to another party, after giving notice to Sinclair, which declined to exercise a first refusal option. Thereafter, the property was sold to Willis. Adams later sought to exercise the fixed price option contained in the original lease, granting Sinclair the right to purchase the premises for $7,000. Willis, owner of the property, refused, contending that Sinclair's failure to exercise its rights under its first refusal option terminated its rights under its purchase option, and this action resulted. The opinion does not set forth the text of options verbatim, but they are described by the Court as follows:

> "In addition to the 'purchase option' in the lease there is another clause known as the 'purchase refusal', and one of the exceptions relates to it. In that clause it is set forth that in the event the lessor shall receive from a third person a bona fide offer to purchase the premises at a specified price, and if the lessor shall decide to sell for that amount, he shall notify the lessee, who shall have the refusal or option of buying the premises at such price, and if the lessee does not elect within ten days to purchase, the lessor may go ahead and sell to the third person, subject to the lease 'and to the extension and/or additional purchase options, if any, herein granted to the lessee.'"

The Court then takes note of the fact that Sinclair declined to purchase the property at the time of the first sale which was made after execution of the lease, and of the second purchaser's defense that this refusal terminated all rights under the purchase option. On this point the Court stated:

"The purchase refusal clause here is quite different from that in the case of **Shell Oil Co. v. Blumberg,** 5 Cir., 154 F. 2d 251, upon which appellant mainly relies. The clause before us is precisely the same, except as to the amount, as that set forth in **Sinclair Refining Co. v. Clay,** D. C., 102 F. Supp. 732, 735, affirmed by the Circuit Court of Appeals in 6 Cir., 194 F. 2d 532. In that case the Court said: 'Contrary to the **Blumberg** case, the parties here expressly agreed that the purchase option was to continue in the event of a sale to a third party, and this intent must be carried out by the court.'

"It will be observed that the present lease provides that any sale shall be subject to the purchase option, wherein the lessee had the right, at any time during the term of the lease, to buy the property for $7,000. The rights of the lessee under the purchase option are continuing, and were not extinguished by its refusal to buy in 1943."

The Court then took up the question which arose from refusal of the trial judge to admit testimony that the property was worth $18,000 at the time of attempted exercise of the option to purchase same for $7,000. The principle governing this situation was stated as follows:

"However, with the evidence in, and duly considered, specific performance should nevertheless be granted, since it is well settled that a mere change in the value of land will not justify a refusal to grant such relief. **Holly Hill Lumber Co. v. McCoy,** 201 S. C. 427, 23 S. E. 2d 372, 373, 380."

Finally, it was argued that the trial court should have denied specific performance, in the exercise of discretion. A similar argument is made in the present case, in which petitioner points out that the price fixed for a purchase option in a 1940 lease was $18,000, and that this price

was increased to $32,500 in the 1950 lease. From this it is sought to be deduced, in some manner, that if lessor gave lessee notice of a bona fide offer in excess of $32,500, then lessee's rights under its fixed price option would be eradicated and deleted from the lease, because of enhancement in value of the property.

As the opinion of the Court in **Adams v. Willis**, above, so appropriately disposes of this argument, a somewhat lengthy excerpt from the opinion in that case is set forth herewith:

> "We can readily understand how it is that the appellant does not like to see Adams come, during the last days of the option, and upon a small consideration reap the benefit of the increase in the value of the lot. However, it cannot be overlooked that people make their own contracts; they have a right to grant fifteen year options if they so desire; and the holder of an option may exercise it at any time while it is in force, even on the last day; the Sinclair company could have exercised the option in May of 1952; the contract gave it the right to assign the option; and the assignment to Adams did not place the appellant in any worse position than he was in before.
>
> "There is not the slightest contention of unfair dealings when the contract was made in 1937. It appears that at that time $7,000 was a full price for the land. Even as late as 1943 Mr. Holleman sold it for that amount. We must look to the situation as it existed when the contract was made, not as it may have been in 1952.
>
> "In **Holly Hill Lumber Co. v. McCoy**, above, it was said: 'The question of adequacy of price must be considered as of the date of the contract, and the subsequent enhancement in value would not justify refusal of specific performance.' **Shannon v. Freeman**, 117 S. C. 480, 109 S. E. 406.

> "The discretion to grant or refuse specific performance is not an arbitrary or capricious one, but a judicial discretion, to be exercised in accordance with the special rules and practices of equity, and with regard to the facts and circumstances of the particular case."
>
> **(83 S. E. 2d at p. 175).**

Butler v. Richardson, 74 R. I. 344, 60 A. 2d 718 (1948), was likewise a specific performance action in which the Court upheld the lessee's right to exercise a purchase option, notwithstanding the lessor's notice of an outstanding offer and the lessee's refusal to meet same under a first refusal provision. The lease in that case provided:

> "It is mutually agreed that, at any time while the Lessees are the occupants of the premises herein leased, as Lessees under this lease or any extension thereof or renewal thereof, or as tenants from month to month or otherwise, the Lessors will give them an option to buy at a price of $15,000. Or if the Lessors shall have any offer for the purchase of said premises, which the Lessors are willing to accept, the Lessors prior to accepting same, give the Lessees an opportunity to purchase the said premises on the same terms, by notifying the Lessees in writing of such offer and giving the Lessees 10 days thereafter in which the Lessees shall decide if they will purchase said premises on the same terms."

With regard to the purchase option, the Rhode Island Supreme Court held: "That agreement is complete and not coupled with or conditioned upon any other agreement." As to the first refusal option, it commented: "It is disjointed therefrom, and in no way forms a part or a condition precedent to the option provision." The Court then continued:

> "But the question here is what effect this provision for a first refusal has, if any, upon the provision for

an option. As we indicated above, it has no effect whatever. The right of option remains unimpaired. Until the time prescribed for its exercise expires, the respondents cannot sell for any amount without complainants' consent. However, the provision for a first refusal may nevertheless serve a useful purpose. It provides a means whereby respondents, if they desired, could induce an acceleration of complainants' decision to purchase by affording them an opportunity to purchase at a price fixed in the option. Of course the provision could not serve this purpose if the offer was at a higher price, and consequently it is inconceivable that the parties in agreeing to the provision could have contemplated any offer except one that was lower than $15,000. We are of the opinion, therefore, that the provision for a first refusal should be construed in that light, not so much as an alternative to the provision for an option but rather as a supplement thereto."

The cases relied upon by petitioner have all been examined, and, in the opinion of respondent, fail to support the position for which they are advanced.

Shell Oil Company v. Blumberg, supra, is viewed as petitioner's closest case, but the language of the lease involved therein specifically provided that the second option was a continuing one, without making such provision with regard to the first option—the fixed price option. Thus the Court in **Sinclair Refining Company v. Clay**, supra, distinguished the case and refused to follow it in a case in which the language of the lease insuring to the lessee its purchase option rights—apart from questions arising under the first refusal option—was less clear and positive than in the present case.

In all of the cases relied upon by petitioner, the first option is qualified and limited by the second option, either explicitly or implicitly, except for one case which is de-

cided upon facts constituting waiver and election, rather than upon construction of the contract.

For example, in **Harding v. Gibbs**, 125 Ill. 85, 17 N. E. 60 (1888), the Court describes the terms of the fixed option and then recites: "But if the lessor should have an offer for the property, 10 days' notice thereof was to be given to the lessee, and he was to have the privilege of buying at said offer." The Court held the first option was not absolute, but was qualified by the second provision—a result which follows from the language employed.

In **Manasse v. Ford**, 58 Cal. App. 312, 208 P. 354 (1922), the first option was qualified by the second option which was connected thereto by the words "Provided however." **Adams v. Helburn**, 198 Ky. 546, 249 S. W. 543 (1923), did not involve language specifically limiting the first option by the second. But neither did it involve language by which the first option is specifically held inviolate notwithstanding failure to act under the second option—as in the case on appeal.

Imperial Refineries Corporation v. Morrissey, 254 Iowa 934, 119 N. W. 2d 872 (1963), merely held as a fact determination that the lessee had waived any rights under the first option and had exercised the second option. **Texaco, Inc. v. Rogow**, 150 Conn. 401, 190 A. 2d 48 (1963), dealt with a dual option provision in a lease whereunder the lessee could exercise the fixed price option only after the first nine years of the lease. The Court concluded that the parties did not intend that the lessee should be precluded from exercising the purchase option for nine years and yet be permitted to exercise it thereafter, notwithstanding notice during the nine year period that lessor had a willing purchaser and that lessee might meet the offer under the first refusal option in the lease. The circumstances of that case differ so widely from those of the present case as to render it hardly analogous, or relevant to the present inquiry.

4. Final analysis.

When finally analyzed, the position of the parties appears to be thus:

a). Shell Oil Company relies upon the clear language of Article Fourteenth stating that its right to purchase the subject property for the sum of $32,500, pursuant to Article Thirteenth, is not prejudiced by any action taken under Article Fourteenth, or by Shell's failure to exercise any option under Article Fourteenth. The cases cited in support of this position have preserved lessees' option rights—even against subsequent purchasers—in cases where the language of the leases was by no means as clear and emphatic in preserving such rights as is the language in the instant case.

b). Petitioner, Mrs. Prescott, contends that when she gave Shell notice of a bona fide offer from a third party, she thus precluded Shell from exercising its fixed price option while she owned the property—although she admits the same option could be exercised against a subsequent purchaser, if exercised prior to the time said purchaser gave Shell notice of an offer under Article Fourteenth. The cases relied upon for extinguishment of the fixed price option do not deal with leases wherein this first option is preserved notwithstanding any action or inaction under the second option—the first refusal option.

c). Petitioner suggests in argument that it would be unfair to permit respondent to exercise its option to purchase for $32,500 when she has an offer for $50,000. This ignores the fact that respondent purchased this very right, and has been paying for same in the form of monthly rental throughout many years. Any argument that this is a unilateral contract and in some manner inequitable fails to recognize the fact that many options are paid for and not exercised, and that when an option is exercised, this is in a situation where the optionee deems it prudent to exercise the right for which payment has been made.

d). Petitioner's argument ignores the inclusion of the following language in Article Fourteenth:

> "Shell shall thereupon, in addition and without prejudice to Shell's rights under Article Thirteenth, have the prior option to purchase said premises and Lessor's improvements, fixtures and personal property thereon from Lessor at said price and terms.
>
> • • • • • • •
>
> "Shell's failure to exercise any option under this Article shall in no way affect this lease, Shell's rights under Article Thirteenth, or its right to the estate herein created."

For petitioner to prevail, this language must be ignored or deleted from the lease. No reason for such an approach has been advanced.

CONCLUSION.

Respondent, Shell Oil Company, respectfully submits that the decision of the United States Court of Appeals for the Sixth Circuit in affirming the action of the District Court granting summary judgment in its favor was correct in all respects, and prays that the petition for certiorari filed herein be denied.

Respectfully submitted,

J. MARTIN REGAN,
2201 First National Bank Building,
Memphis, Tennessee 38103,
Attorney for Respondent
Shell Oil Company, Inc.

LAUGHLIN, WATSON, GARTHRIGHT &
HALLE,
Of Counsel.